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No. 82-556

IN THE

Supreme Court of the United States

October Term 1982

PRESS-ENTERPRISE COMPANY, a California corporation,

Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF RIVERSIDE,

Respondent.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

ALBERT GREENWOOD BROWN, JR.,

Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT, DIVISION TWO.

BRIEF AMICUS CURIAE OF CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION.

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BRIEF AMICUS CURIAE OF CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION.

Preliminary Statement.

California Newspaper Publisher Association (CNPA) submits this Brief Amicus Curiae in support of petitioner, Press-Enterprise Company. All parties to this action have given CNPA written consent to the filing of this Brief. Copies of such consents have been filed with the Clerk of this Court.

Interest of the Amicus.

CNPA is a non-profit organization duly organized under the laws of the State of California. Its members include over 400 daily and weekly newspapers, approximately 100 student newspapers and the majority of newspaper publishers in California.

Since the early 1930's, CNPA has been active in promoting and advancing the general interest and concerns of newspapers and newspaper publishers in California and further has actively encouraged improvement of the manner in which the journalism profession fulfills its obligation to the public to provide complete and accurate reports of executive, legislative and judicial affairs.

CNPA has followed, with growing concern, California trial courts' interpretation and application of the mandate prescribed in the California Supreme Court decision of *Hovey v. Superior Court*, 28 Cal. 3d 1, 168 Cal. Rptr. 128, 616 P.2d 1301 (1980). CNPA is aware this issue has been previously brought to this Court for review. In the October term of 1981, petitioner sought certiorari in a similar case and three justices voted to grant certiorari.[1] CNPA believes, however, that the infringement of First Amendment rights in the instant action is the most serious and grievous to date. The trial court not only excluded the public from the actual voir dire proceedings, but thereafter permanently sealed the transcript of those proceedings. The refusal of the California appellate courts and the California Supreme Court to review this trial court's action only serves to encourage other trial

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[1]The petition was in *Press-Enterprise Company v. Superior Court of California, County of San Diego*, Case No. 811022, the trial Court closed the entire voir dire proceedings and the appellate court ordered the transcripts to be released at the end of the jury selection. Although the petition was denied, Justices O'Connor, Marshall and Brennan voted to hear the case.

courts to take similar measures. At a time when this Court has so recently established and reinforced the public's right of access to criminal trials as guaranteed by the First Amendment, such action in California courts cannot be tolerated.

In California, as in the rest of the nation, the courts are increasingly under attack. The people's concern about the increase in crime in their lives has caused them to focus on the courts as they look for someone to blame for society's problems. The CNPA is concerned the apparent increase in the denial of access to the courts is a trend which will exacerbate the problem of the public perception of the courts and the administration of justice.

Statement of the Case and Constitutional Provisions Involved.

Your Amicus adopts the statement of the case as set forth in the Petition for Writ of Certiorari filed by Press-Enterprise Company.

Summary of Argument.

We urge upon the Court that, in light of its most recent decision in *Globe Newspaper Company v. Superior Court for the County of Norfolk* (No. 81-611) ... U.S. ..., 73 L. Ed. 2d 248, 102 S. Ct. ..., petitioner's request for a Writ of Certiorari should be granted. The public's First Amendment right of access to criminal trials is now firmly established. California trial courts are nonetheless arbitrarily closing the voir dire proceedings in capital cases.

Selection of the jury is an integral portion of the public trial. Public understanding of our system of justice is incomplete without an understanding of how the trier of fact is selected. Cloaking this important phase of the trial in secrecy only serves to engender suspicion and disrespect of the judicial system.

While the First Amendment right of access to trials is not absolute, it cannot be abridged arbitrarily. There must first be a showing of compelling governmental interest and the unavailability of less intrusive means to fulfill that governmental interest. The California Supreme Court decision in *Hovey v. Superior Court, supra,* 28 Cal. 3d 1, suggests no compelling interest which necessitates exclusion of the public from the voir dire proceeding. Further, neither the California Supreme Court in the *Hovey* decision nor the trial court in this instant action examined alternatives less intrusive on First Amendment rights before excluding the public from voir dire proceedings. Sealing the transcript of those proceedings in the instant action is totally unjustified.

Review by this Court is necessary to clarify the confusion existing in the California trial courts which has ensued from the *Hovey* decision. This decision, as it is being interpreted and applied by the California trial courts, is in direct conflict with this Court's recent decision in *Globe Newspaper Company v. Superior Court for the County of Norfolk, supra,* and violates petitioner's First Amendment right of access to criminal trials.

ARGUMENT.

I.

The Public Has a First Amendment Right of Access to Criminal Trials.

The existence of the public's First Amendment right to attend criminal trials cannot be seriously challenged in light or this Court's more recent decisions. In *Gannett Co., Inc. v. De Pasquale*, 443 U.S. 368, 61 L. Ed. 2d 608, 99 S. Ct. 2898 (1979), this Court conceded the existence of "a strong societal interest in public trials".

Later, in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 65 L. Ed. 2d 973, 100 S. Ct. 2814 (1980), in a plurality decision, this Court recognized the right to attend criminal trials is implicit in the First Amendment guarantees. This Court determined that the historical evidence conclusively demonstrated that the presumptive openness of the trial was "no quirk of history" but rather was indispensable to our judicial system. Further, the Court stated that the explicit guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial was denied.

The existence of the public's First Amendment right of access to criminal trials was firmly established most recently in *Globe Newspaper Co. v. Superior Court for the County of Norfolk, supra.*

> "Although the right of access to criminal trials is of constitutional stature, it is not absolute. (Citations) But the circumstances under which the press and public can be barred from criminal trials are limited; the State's justification in denying access must be a weighty one." *Globe Newspaper Co. v. Superior Court, supra*, 73 L. Ed. 2d 248, 257.

II.

The Voir Dire Proceeding Is an Integral Portion of the Trial Process.

The voir dire examination of prospective jurors has been considered a public and integral part of the complete trial process (*Commercial Printing Co. v. Lee*, 262 Ark. 87, 553 S.W.2d 270 [1970], cited in the opinion of Justice Blackmun in *Gannett Co., Inc. v. De Pasquale*, 443 U.S. 368, 432, n. 12; *Rapid City Journal v. Circuit Court*, 283 N.W. 2d 563, 566, n. 5 [S.C. 1979], [citing *United States v. Woods*, 364 F.2d 481, cert. den. 385 U.S. 972 [3d Cir. 1966]). California case law states that the jury selection is an integral part of a public trial. *People v. Murphy*, 35 Cal. App. 3d 905 (1973); *People v. Teitelbaum*, 163 Cal. App. 2d 184 (1958).

The voir dire process is potentially the most important phase of any trial. The selection of the persons who sit in judgment, especially in a case of public notoriety, is a matter of fundamental concern. The process by which the impartiality and fairness of individual jurors is judged is a matter which must be widely understood and accepted in order for the public to accept the validity of trial results.

III.

The Trial Court in the Instant Action Arbitrarily Violated First Amendment Rights by Excluding the Public From the Voir Dire Proceedings and Thereafter Sealing the Transcript.

The trial court excluded the public from the voir dire proceedings using, as its basis for doing so, the *Hovey* decision. Thereafter, the trial court sealed the record using the rationale that the jurors had been questioned in the private voir dire proceedings regarding sensitive and highly

personal matters and that such information should not be released to the public.

In the *Hovey* decision, the California Supreme Court's concern was the impact of prospective jurors observing extensive death-qualifying questioning. Nowhere in the opinion did the Court discuss any effect the public's presence may have on venire persons.

Further, the fact that jurors may sometimes be asked to reveal highly personal and sensitive information does not justify total exclusion of the public from this important phase of capital trials. When "the State attempts to deny the right of access in order to inhibit disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest and narrowly tailored to serve that interest." *Globe Newspaper Co. v. Superior Court, supra*, 73 L. Ed. 2d 248, 257.

It is conceded that in some limited circumstances, it may be necessary to postpone the public's access to certain information until after a trial has been concluded. In the instant action, however, the public will forever be ignorant of what transpired during the voir dire proceeding due to the trial court's decision to permanently seal the transcript of those proceedings. Allowing the trier of fact to be selected entirely in secret not only violates the public's First Amendment rights but also endangers the entire judicial process by casting suspicion and doubt on its ability to function as a disciplinary arm of society.

IV.
Conclusion.

The public and press's First Amendment right to attend the criminal trials is now firmly established. Abridgement of this right cannot be arbitrary but must be supported by a showing that such infringement is necessitated by a com-

pelling government interest and that there are no alternatives less intrusive on First Amendment rights.

The absence of direction and clarity in the *Hovey* decision has resulted in an arbitrary violation of the public's rights to attend criminal trials. Further, the lower court's action in the instant case, expanding the *Hovey* decision to include sealing the transcript creates a dangerous precedent and incalculable risk for future disclosures of not only voir dire proceedings, but other parts of the criminal trial and by no means limited to capital cases.

The refusal of California courts and the California Supreme Court to review the action taken in the instant case makes the need for review by this Court more compelling. To allow this action to go unchallenged could be interpreted as tacit approval; thus encouraging California trial courts to continue to erode the public's right of access to trials.

Your amicus respectfully submits that review by this Court is essential to further clarify the rights of the public to attend criminal trials specifically the voir dire proceeding not only in capital cases, but all cases in which sensitive areas of voir dire examination may arise.

It is respectfully prayed that this Court grant a writ of certiorari, reverse the decisions below and grant a hearing to consider the rights of public to attend and observe the trial process.

Respectfully submitted,

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